COVERAGE FOR DEFAMATION CLAIMS UNDER THE COMMERCIAL GENERAL LIABILITY POLICY

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No, 'tis slander,
Whose edge is sharper than the sword, whose tongue
Outvenoms all the worms of Nile, whose breath
Rides on the posting winds, and doth belie
All corners of the world; kings, queens, and states,
Maids, matrons, nay, the secrets of the grave
This viperous slander enters.
Wm. Shakespeare, Cymbeline, act iii, scene 4

But what comes out of the mouth proceeds from the heart, and this is what defiles. For out of the heart come evil intentions, murder, adultery, fornication, theft, false witness, slander.
Matthew 15:18, 19

For many centuries, societies have recognized that to publish false statements that cause injury to the honor and reputation of another is a grievous wrong. In the Bible, Matthew places slander in the same category as murder, adultery, fornication, theft, false witness, and other “evil intentions.” Shakespeare described it as having an edge “sharper than the sword.”

Given these historical views regarding the nature of slander, one might surmise that public policy would categorically prohibit the procurement of insurance to cover such egregious conduct. While it is clear that many insurance policies do not cover claims for libel or slander, this is because the provisions of the contract simply cannot be reasonably construed as affording such coverage, not because public policy forbids it. Where the language in an insurance policy can be construed to require the insurer to defend or provide indemnity for a claim of defamation, such will generally be required.1 In cases involving a standard com-

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* Mr. Claytor is a partner in the Richmond firm of Harman, Claytor, Corrigan & Wellman and is a past president of the Virginia Association of Defense Attorneys.
** Mr. Cole is of counsel in the Richmond firm of Harman, Claytor, Corrigan & Wellman.

mercial general liability ("CGL") policy.\textsuperscript{2} This will typically include situations in which the underlying complaint contains allegations of recklessness in accordance with the definition of "actual malice" established in \textit{New York Times v. Sullivan},\textsuperscript{3} or of some degree of fault less than either publication with knowledge of falsity or with a specific intent to injure. While a reasonably persuasive argument can be made that indemnification should not be required where the insured acted with "common-law malice," that is, evil motives, spite, ill will, or the specific intent to injure, it is unclear whether such an argument would be successful. The resolution of this issue would most likely depend on the specific phrasing of the "personal injury" provisions of the policy as well as the phrasing of the intentional harm exclusion. How this issue would be resolved in Virginia remains an open question.

I. THE COMMERCIAL GENERAL LIABILITY POLICY

The starting point for any coverage analysis must be the insuring agreement. If the language in that portion of the policy does not require the insurer to assume the defense of or to indemnify the insured, there is no need to consider whether there might be alternative grounds for denying coverage such as the insured's breach of the policy's conditions or the applicability of an exclusion. Only if the requirements of the insuring agreement are satisfied must the exclusions and other policy provisions be considered.

The typical CGL policy provides several distinct types of coverage with each type being identified by a different letter. Thus, section I of the standard CGL policy includes Coverage A for bodily injury and property damage liability, Coverage B for personal and advertising injury liability, and Coverage C for medical payments.\textsuperscript{4} Each of these coverages has its own insuring agreement and exclusions.

A. COVERAGE A

Coverage A is the section of the policy that is the subject of the greatest amount of litigation due to the fact that it provides the bodily injury and property damage liability coverage that may apply in the ordinary negligence case where the plaintiff is primarily seeking to recover for physical injuries and/or property damage. The first part of the insuring agreement in Coverage A states the obligation assumed by the insurer as follows:

1. Insuring Agreement.

\textsuperscript{2} Insurance Services Office Form CG 00 01 10 93.
\textsuperscript{3} 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964).
\textsuperscript{4} Medical payments coverage is obviously irrelevant to the present discussion and will not be further addressed.
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend any "suit" seeking those damages.

Under the plain language of this provision, an insurer is required to indemnify an insured only for sums he is required to pay as damages because of "bodily injury" or "property damage" and is required to defend the insured only where a "suit" has been filed seeking those damages.

The second part of the insuring agreement in Coverage A further limits the scope of the bodily injury and property damage liability coverage:

b. This insurance applies to "bodily injury" and "property damage"
only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence[]."

An insured seeking a defense or indemnification under Coverage A in a defamation case must thus show that the underlying complaint includes allegations that the plaintiff suffered "bodily injury" or "property damage" as the result of an "occurrence."

Looking to the definitions in the CGL policy, the difficulties the insured will encounter in seeking to invoke this coverage become readily apparent. The phrase "bodily injury" is defined as "bodily injury, sickness or disease sustained by any person, including death resulting from any of these at any time." It is clear that injury to a party’s reputation, including any consequential psychological distress, resulting from a libelous or slanderous publication does not constitute "bodily injury."6 It is equally clear that injury to an insured’s reputation or standing in the community does not constitute "property damage." "Property damage" is defined in the CGL as "physical injury to tangible property, including all resulting loss of use of that property" or, alternatively, as the "loss of use of tangible property that is not physically injured."

Even if an insured was able to persuade a court that a plaintiff’s allegations included claims for "bodily injury" or "property damage," it would still be required to establish that the alleged injury was caused by an "occurrence." According to the terms of the policy, an "occurrence" "means an accident, including continuous or repeated exposure to the same general harmful condi-

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5 Terms in quotation marks are specifically defined in the policy.
tion.” In Wooden v. John Hancock Mutual Life Insurance Co., the Supreme Court of Virginia defined an accident as “an event that takes place without one’s foresight or expectation; an undesigned, sudden, and unexpected event: . . . an undesigned and unforeseen occurrence of an afflicted or unfortunate character[].”

Defamation has long been recognized as an intentional tort and the publishing of a defamatory statement could hardly be regarded as an accident.

If an insured achieved the virtually impossible task of satisfying the requirements of the insuring agreement in Coverage A, it would then be appropriate to look to the second part of Coverage A, which sets forth the exclusions. The first of these provides as follows:

This insurance does not apply to:
   a. Expected or Intended Injury
      “Bodily injury” or “property damage” expected or intended from the standpoint of the insured.

This exclusion could be construed to eliminate any possibility of coverage inasmuch as defamation is clearly an intentional tort. While a contrary result is also possible because a cause of action for defamation may be based on negligence or recklessness, this issue is likely to be of no practical significance in light of the obstacles the insured would face in meeting the previously discussed requirements of the insuring agreement.

B. COVERAGE B

Unlike the situation with Coverage A, Coverage B was plainly intended to apply to certain defamation claims. The first part of the insuring agreement provides as follows:

1. Insuring Agreement
   a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal injury” or “advertising injury” to which this insurance applies. We will have the right and duty to defend any “suit” seeking those damages.

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   b. This insurance applies to:

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7 205 Va. 750, 754-55, 139 S.E.2d 801 (1965). See also West Am. Ins. Co. v. Bank of Isle of Wight, 673 F. Supp. 760, 766 (E.D. Va. 1987) (applying Virginia law) (even if emotional distress constituted “bodily injury” for purposes of insurance coverage, wrongful termination did not constitute an “occurrence”; the “standard definition of ‘occurrence’ limits insurance coverage to ‘damages arising from mistake or carelessness’ on the part of the insured rather than from ‘intentional or reckless acts.’”)

8 It should be noted that the typical homeowner policy does not include coverage for “personal injury,” including defamation, but such coverage may be added through the purchase of ISO endorsement HO 24 82 10 00.
(1) "Personal injury" caused by an offense arising out of your business, excluding advertising, publishing, broadcasting or telecasting done by or for you.

Under section 1.b. of the Insuring Agreement, the "personal injury" must be caused by an offense arising out of the insured's business to be covered.

"Personal injury" expressly includes libel and slander. Thus, "personal injury" is defined in relevant part as:

injury, other than "bodily injury," arising out of one of more of the following offenses:

* * *

d. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

The definition of "personal injury" also includes other torts that have been traditionally described as "intentional," such as false arrest and malicious prosecution. Because Coverage B expressly covers certain intentional torts, including libel and slander, an insurer issuing a CGL policy will generally be required to defend and indemnify an insured charged with defamation in the business context absent some other provisions relieving it of such duty.

Although Coverage B does not contain an exclusion like that found in Coverage A for injuries "expected or intended from the standpoint of the insured," it does exclude coverage for "personal injury" if it is "caused by or at the direction of the insured with the knowledge that the act [will] violate the rights of another and [will] inflict 'personal...injury.'" The CGL policy also excludes coverage for "personal injury" "[a]rising out of oral or written publication of material, if done by or at the direction of the insurer with knowledge of its falsity." Thus, if the insured either knows the published statement is false or causes it to be published with knowledge that such publication will violate the rights of another, a resulting claim will not be covered.

II. *FUISZ v. SELECTIVE INSURANCE CO. OF AMERICA*

Prior to the decision of the United States Fourth Circuit Court of Appeals in *Fuisz v. Selective Insurance Co. of America,* there was no authority applying Virginia law to an insured's claim that it was entitled to a defense and indemnity in connection with an underlying action for defamation. The policies at issue in *Fuisz* were two identical personal catastrophe liability policies issued by Selective Insurance Co. Those policies provided coverage for "personal injury" liability and defined "personal injury" to include "injury arising out of...[l]ibel, slander or defamation of character."10 Unlike the typical CGL policy, which

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9 61 F.3d 238 (4th Cir. 1995) (applying Virginia law)
10 *Id.* at 240.
contains separate exclusions for Coverage A and Coverage B. Each of the policies at issue in Fuisz contained a single set of exclusions. One of these stated that Selective would not provide coverage for “any act committed by or at the direction of an insured with intent to cause . . . personal injury . . . .”

The underlying litigation in Fuisz involved three affiliated plaintiffs, collectively referenced as Terex, and two individual defendants, one of whom, Dr. Fuisz, was the insured and the other, Seymour Hersch, was a well-known journalist. Terex alleged that after certain business negotiations between it and Dr. Fuisz broke down, Dr. Fuisz launched a personal “vendetta” to destroy the business reputation of Terex. Terex was a manufacturer of heavy construction equipment and it alleged that, as part of his smear campaign, Dr. Fuisz made defamatory statements to various journalists and others to the effect that, at the time of the first Gulf War, Terex had illegally sold trucks adapted to serve as scud missile launchers, or for other military use, to the regime of Sadaam Hussein.

Terex asserted four causes of action, three for libel and one for slander. With respect to each of the four claims Terex alleged that “Fuisz published the defamatory statements . . . [and] knew that the statements were false, or published the statements with reckless disregard as to whether they were true or false.” Terex further alleged, repeatedly, that “[i]n publishing these false and defamatory statements . . . Fuisz was motivated by actual malice and willfully and willfully intended to injure plaintiffs.” Selective refused to defend Dr. Fuisz relying, in part, on the intentional acts exclusion. Dr. Fuisz filed an action for declaratory relief and for compensatory and ancillary damages seeking a declaration that Selective was required to pay any legal liability for which he was responsible and to recover the past costs of defense, the future costs of defense, and attorneys’ fees. The United States District Court for the Eastern District of Virginia ruled in favor of Selective and rejected Dr. Fuisz’s claims that he was entitled to a defense and indemnification. Dr. Fuisz appealed to the Fourth Circuit.

In a decision from which Judge Neimeyer dissented, Judge Motz, joined by Judge Ervin, reversed the decision below with respect to the duty to defend, vacated the decision with respect to the duty to indemnify, and remanded the case for further proceedings. The court observed that, “at first glance,” the coverage for personal injuries arising out of defamation and the policy’s exclusion for acts intended to cause personal injury appeared to be in direct conflict, particularly when one recognized that defamation is commonly classified as an “in-

\[11\] Id. The Selective policies also excluded claims for damages arising out of or in connection with a business engaged in by the insured. Although the applicability of these exclusions was litigated in Fuisz, that aspect of the case is not relevant to the present discussion in that the specific purpose of the CGL policy is to cover business risks whereas the policies at issue in Fuisz were intended to cover personal risks.

\[12\] Id. at 241.

\[13\] Id.
tentional tort." However, the court declined Dr. Fuisz’s invitation to find the policy so inherently ambiguous as to provide coverage for all defamation claims. Instead, the court adopted the approach suggested by Selective. The insurer conceded that the policies generally covered libel and slander but argued that the exclusion became operative and cut off such coverage if the insured acted with the specific intent to cause harm. The court thus concluded that “coverage for injuries arising from defamation claims is excluded when the insured intends to cause that injury.”

Applying this analysis, the court then looked to the underlying Terex complaint to determine whether Terex had alleged causes of action based only upon common-law malice, which was defined as “behavior actuated by motives of spite, ill-will, independent of the occasion on which the communication was made,” or whether Terex had also included claims based upon the “actual malice” standard derived from New York Times v. Sullivan, which does not require ill will and may be satisfied upon proof of “recklessness.” Although finding that the complaint was “permeated” with allegations that Fuisz acted intentionally—with personal spite and ill will—to defame Terex, the court also found that Terex repeatedly alleged that Dr. Fuisz made the statements recklessly or with “actual malice.” Based on these allegations, the court reversed the district court and held that Selective was required to provide Dr. Fuisz with a defense.

The court vacated that portion of the district court’s decision that had held that Selective was not required to indemnify Dr. Fuisz on the grounds that the resolution of that issue would have to await disposition of the underlying controversy.

III. ANALYSIS OF CGL POLICY PROVISIONS IN LIGHT OF FUISZ

It must be emphasized that the policies at issue in Fuisz were not CGL policies but personal catastrophe policies issued to protect Dr. Fuisz’s personal interests. These policies differed from the standard CGL significantly in that they included an exclusion for acts committed with the intent to cause injury that applied to the coverage for libel and slander, as well as the other coverages afforded by the policies. As a result, the decision in Fuisz cannot be cited for the general proposition that CGL policies or any other policies that provide coverage for defamation claims do not apply if the plaintiff alleges that the insured acted with common-law malice or specific intent. The challenge confronted by the court in Fuisz was how to reconcile the provisions of the insuring agreement

14 Id. at 242-43.
15 Id. at 243.
16 Id.
17 Id. at 243-44
18 Id. at 244

19 The court cited Parker v. Hartford Fire Insurance Co., 222 Va. 33, 278 S.E.2d 803 (1981), for the proposition that where both covered and excluded acts are alleged in the underlying complaint, the duty to defend attaches.
that provided coverage for defamation claims, with the terms of the intentional-
injury exclusion. The critical question left open in Fuisz is whether an insurer is 
required to provide a defense and indemnification where a plaintiff alleges that 
the insured was motivated by common-law malice or acted with the specific 
intent to cause injury and the policy, like the standard CGL policy, generally 
provides coverage for defamation but contains no exclusion for intentional 
harm.

Because Coverage B under the standard CGL policy defines “personal in-
jury” to include libel and slander and the policy expressly excludes publication 
of material by or at the direction of the insured with knowledge of its falsity, 
there is no basis for arguing that this exclusion extends to defamatory state-
ments made with common-law malice or some lesser degree of fault but without 
knowledge of their falsity.

A closer question may be presented under the exclusion that applies when an 
insured causes the publication of a defamatory statement with knowledge that 
this will violate the rights of another. Where the claimant alleges that the injury 
suffered was the intended result of an intentional act, it appears that an 
insurer may properly invoke the plain language of this exclusion in the policy as 
a basis for denying a defense or indemnification.

This result would be in keeping with the general rule that public policy bars 
insurance coverage for intentional wrongdoing. Thus, in Fedele v. National Lib-
erty Insurance Co., the court held that public policy precluded recovery by an 
insured who had arranged for a third party to burn an insured motor vehicle. It 
has been stated that this public-policy defense is confined to cases in which the 
insured acts with the specific intent to cause harm, but this indicates that the 
doctrine could be applied where the evidence established that an insured specifi-
cally intended to damage the reputation of a plaintiff. The Fourth Circuit has 
responded that coverage will not be denied in the absence of “a clear and dominant 
policy.” Where a plaintiff alleges that the insured published the defama-
tory statements with common-law malice and the specific intent to inflict injury, 
an insurer could certainly argue that the centuries-old law of torts that applies 
when one deliberately injures another enunciates such a clear and dominant public policy.

S.C. 241, 403 S.E.2d 643 (1991) (policy that covered defamation and other intentional torts but that contained 
an exclusion for injuries expected or intended from the standpoint of the insured was internally inconsistent 
and would be construed to afford coverage for defamation judgment based on actual malice).

21 184 Va. 528, 35 S.E.2d 766 (1945).

22 Atlantic Permanent Fed. Sav. & Loan Ass’n v. American Cas. Co. of Reading, Pa., 839 F.2d 212, 217 (4th 
Cir. 1988) (applying Virginia law).

IV. Conclusion

Under the language found in Coverage B of the standard CGL policy, a court will most likely find that an insured is required to provide a defense and indemnity for an insured whose alleged liability for defamation is or could be based on negligence or recklessness. This includes cases in which the insured is alleged to have acted with “actual malice” under New York Times v. Sullivan inasmuch as that standard encompasses the publishing of a defamatory statement with a reckless disregard for whether it is true or not. To the extent the plaintiff in the underlying action alleges that the insured made the statement at issue knowing that it was false, this would come within the exclusion that specifically applies to such statements under Coverage B. Left open for argument is the issue of whether a CGL policy should be construed to require an insurer to provide a defense or indemnity where the plaintiff alleges or proves only that the insured acted with evil motives, spite, ill will, and so forth. Under such circumstances it can be argued that it would be contrary to public policy to permit an insured to escape personal liability and to shift the responsibility for the damages caused by his deliberately injurious conduct to an insurer.